Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-840

WICKHAM CONTRACTING CO., INC. and INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

—against—

ROBERT J. HARDER, INC., LEJAC METAL SPECIALTIES, INC., H. KLEIN & SONS, INC., CARDA WINDOW CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Justices of the Supreme Court:

Petitioners, Wickham Contracting Co., Inc. and Insurance Company of North America, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 25th, 1979.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix A annexed hereto. The opinion of the United States District Court for the Eastern District of New York is unreported and appears in Appendix B annexed hereto.

Jurisdiction of the Court

The judgment of the Court of Appeals for the Second Circuit was entered on June 25th, 1979. A timely petition for rehearing en banc was denied on August 10th, 1979 and the time for petitioners to file this petition for certiorari was extended to and including the 29th day of November 1979 by order of Mr. Justice Harry A. Blackmun dated November 14, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The names of the respondents, who have appeared and, who still have an interest in this action are listed in Appendix C annexed hereto.

Questions Presented

1. Should a subcontractor's Miller Act action be stayed, where that subcontractor has contractually agreed to the stay and/or to submit its disputes to the administrative forum provided for under the "disputes clause" of the general contract with the government.

2. Did the rendering of the Contracting Officer's decision after subcontractors' motions for summary judgment had been granted herein, constitute grounds for reconsideration of these motions under F.R.C.P. Rule 60(b)

where the decision claimed deficiencies in the performance of the subcontractors.

3. Is a contractor entitled to recover its contract balance which the government concedes belongs to the contractor but nevertheless has deposited into court.

Statute Involved

The Miller Act, 40 U.S.C. § 270(b) provides as follows:

> (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material

was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Aug. 24, 1935, c. 642, § 2, 49 Stat. 794; Aug. 4, 1959, Pub.L. 86-135, § 1, 73 Stat. 279.

Statement of the Case

Petitioner, Wickham Contracting Co., Inc. is a general contractor, who contracted with the government for the performance of certain alteration work at Samuels Hall in the United States Merchant Marine Academy at Kings Point, New York. Petitioner, Insurance Company of North America delivered a performance and Miller Act payment bond to the government in connection with said project.

The contract contains a disputes clause which establishes an administrative mechanism for resolution of all disputes by the contractor against the government as follows:

6. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and

in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

Thus, it is not until the matter is taken to the Board of Contract Appeals that the contractor and its subcontractors may present their claims and defend against the claims of the government at a de novo hearing.

After executing the general contract, Wickham Contracting Co., Inc. subcontracted all of the acoustical and ceiling work to respondent Robert J. Harder, Inc., all of the sheet metal work to respondent H. Klein & Sons, Inc. all of the projection, screens, cloth, chalkboards, tackboards and some of the kitchen equipment to respondent Lejac Metal Specialties, and all of the aluminum window work to respondent Carda Window Corporation. Except for the scope of the work, the subcontracts of all subcontractors are essentially identical. The disputes clause of the general contract is incorporated into the subcontract under paragraph "1" which provides as follows:

> "The subcontractor represents that it has carefully examined all the documents, plans and other papers hereinbefore defined collectively as the principal contract and is thoroughly familiar with each of them. It is agreed that the principal contract shall be held and taken as part of the subcontract in every particular."

In addition, the subcontract provides for a "flow-through" arrangement whereby the subcontractor was required to present any of its claims for extra work, delay damages, etc. and its defenses to claims made against its work by the Contracting Officer (Paragraphs "19", "23", "25" and "29" of the subcontract) before the same administrative tribunal (Board of Contract Appeals) that Wickham was required to present its claims. The said subcontract provisions, also, provide for a stay of all actions commenced by a subcontractor pending the exhaustion of these administrative remedies (Paragraph "23" of the subcontract). Paragraphs "19", "23", "25" and "29" of the subcontract is annexed hereto as Appendix D.

The bulk of the work under said general contract was performed by Wickham Contracting Co., Inc.'s subcontractors. During the course of the project, the government terminated its contract with Wickham Contracting Co., Inc. and relet the balance of the work to be completed. The government, also, withheld funds to cover liquidated damages and the cost of completion. Thereafter, Wickham Contracting Co., Inc. requested that the Contracting Officer issue a final determination pursuant to the disputes clause of the general contract.

There are two suits involved in this matter, both of which were assigned to Judge Pratt in the Eastern District Court of New York. One action was commenced by the government by way of an interpleader action wherein the government deposited the sum of $77,760.33 into Court out of funds due Wickham Contracting Co., Inc. on said contract and interpleaded petitioners and all of their subcontractors. In this action three of Wickham Contracting Co., Inc.'s subcontractors, H. Klein & Sons, Inc., Lejac Metal Specialties, Inc. and Robert J. Harder, Inc. cross-claimed under the Miller Act in said interpleader action and then moved for summary judgment. In the

other action, respondent Carda Window Corporation commenced a separate Miller Act action and, also, moved for summary judgment.

On October 10th, 1978 Judge Pratt signed an order granting summary judgment against petitioners and in favor of H. Klein & Sons, Inc. Robert J. Harder, Inc. and Carda Window Corporation in the respective amounts of $13,066.29, $12,351.39 and $50,326.45 and granting partial summary judgment in favor of Lejac Metal Specialties, Inc. with the entry of judgment to abide the trial of the balance of Lejac Metal Specialties, Inc.'s claim.

However, it was not until January 11th, 1979, some four months after Judge Pratt made his order granting summary judgment, that the Contracting Officer issued his final determination which attributed specific damages for delays and defective work to the above subcontractors, and denied claims for extra work of said subcontractors. The Contracting Officer then deducted all of the above items from the contract balance due Wickham Contracting Co., Inc. despite the fact that Judge Pratt had already allowed these sums to the said subcontractors under their respective motions for summary judgment.

Two weeks later Wickham Contracting Co., Inc. brought on an application before Judge Pratt for an order pursuant to F.R.C.P. 60(b) to renew and rehear motions for summary judgment made by said subcontractors; for an order staying all proceedings in the District Court pending an appeal of the Contracting Officer's decision to the Board of Contract Appeals and for an order declaring Wickham Contracting Co., Inc. to be the owner of the interpleaded sum.

Certiorari Should be Granted for the Following Reasons

I.

Important Question of Federal Law Involved

The Government issues billions of dollars in contracts for construction and procurement work each year. Almost all of these contracts contain the standard "disputes clause" which is identical in all respects to the "disputes clause" in the case at bar.

Under the Tucker Act of 1887 (Active March 3, 1887, 24 Stat. 505, 28 U.S.C. 1346) the Government waived its immunity and given its consent to be sued in the District Court only under certain conditions. The Government refuses to be sued in the District Court for contract disputes and instead has set up a system of administrative proceedings which culminate before the Court of Claims and the United States Supreme Court. This system appears to be the only forum in which the Government can be brought in to determine disputes under the general contract.

On the other hand, subcontractors may have their disputes determined in two possible forums. They may bring suit in the District Court in which the project is situated under the Miller Act or, in the alternative or concurrently, agree to submit their dispute through the general contractor in the same administrative forum in which the contractor presents its disputes against the Government under the "disputes clause" found in the general contract.

Appeal of General Installation Co., ASBCA 2061, 4 CCF 6162 (1954); Appeal of Farnsworth & Chambers, Inc., ASBCA 5768, 60-2 BCA 2717 (1960); Appeal of Model Engineering & Mfg., Inc., ASBCA 5735, 60-2 BCA 2680 (1960); Appeal of Morrison-Knudsen Co., Inc., ASBCA 4929, 60-2 BCA 2799 (1960); Appeal of Bateson & Co.,

ASBCA 5959, 61-2 BCA 3214 (1961); Appeal of Tidewater-Kiewit-P.E.C., ASBCA 6971, 61-2 BCA 3178 (1961). This practice is approved by the courts, *Snare & Triest Co.* v. *United States,* 57 Ct.Cl. 151 (1922).

In the majority of the instances, as in the case at bar, the disputes of the general contractor against the government are really disputes between the subcontractor and the Government. The general contractor is merely a conduit.

The advantages of having the general contractor, subcontractor and government dispose of their respective disputes in one forum is very clear. From a point of good judicial administration, such an action results in a settlement of the claims of all parties in one proceeding, thereby avoiding inconsistency of determinations and avoiding necessity of having the same issues tried twice in separate forums.

The case at bar clearly defines the disadvantages of multiple forums. The District Court Judge, in granting summary judgment to four subcontractors reached an inconsistent determination from the determination made by the Contracting Officer. Whether this determination will be sustained by the Board of Contract Appeals in the administrative forum is yet to be decided.

Another danger imposed by the rule of two separate forums was, also, clearly shown by the case at bar. If the contractor opposes a subcontractor's claim in District Court with its independent knowledge, such an action nullifies the right of the contractor to presents its subcontractors' claims thereafter before the Board of Contract Appeals. Appeal of *Brisco Co., Inc.,* G.S.B.C.A. 1691, 67-1, B.C.A. 6161 (1967); appeal of *Holder Construction Co.,* G.S.B.C.A. 1913, 68-1 B.C.A. 7072 (1968). The contractor is then placed in the untenable position of having

to choose between vigorously opposing the subcontractor in its motion for summary judgment or trial in the District Court and being barred from presenting the subcontractor's claim before the Board of Contract Appeals.

In the case at bar, the District Court and the Circuit Court of Appeals both argued in their opinions that the contractor could have opposed the motions for summary judgment of its subcontractors by independent knowledge of what took place on the construction site rather than awaiting the determination of the Contracting Officer. However, if the contractor had done so, it would have been barred from presenting the claims of its subcontractors before the Board of Contract Appeals. Instead, it opposed the motion for summary judgment by requesting that the Court delay the motion until the Contracting Officer had made a determination. This the Court refused to do, resulting in the present inconsistent decisions. Under the circumstances, the only course left open to the contractor was to bring a Rule 60(b) motion to vacate the summary judgments after the Contracting Officer rendered his decision specifically allocating delays and imposing liquidated damages to the work of the very subcontractors whose motions for summary judgment have been granted in the District Court. The Contracting Officer also denied over one-third of the claim of Robert J. Harder, Inc. which had been previously granted in the motion for summary judgment. Clearly, the Contracting Officer's decision reversed the basic assumption by Judge Pratt of due performance by the subcontractors.

This was almost identical to a situation in the case of *Block* v. *Thousand Friend,* 170 F.2d 428, 429 (2nd Cir. 1948) in which the District Court rendered a judgment in favor of tenants and against the landlord based on the determination of the area rent director but before the landlord had exhausted his administrative remedies. There-

after, the top administrator granted the landlord's protest against the refund decision of the area rent director upon whose decision the Court had entered judgment. The landlord moved under Rule 60(b) to reverse the judgment for the tenants. The Circuit Court of Appeals reversed the District Court's refusal to disturb the judgment under Rule 60(b).

It is respectfully submitted that the Circuit Court refused to follow herein its own prior decision. Rule 60(b) is the only vehicle that the contractor has to extricate himself from inconsistent determination unless the Court stays the Miller Act action pending a determination in the administrative forum. The District Court is being flooded by Miller Act disputes that could well be and should be determined in administrative forums.

II.

Conflict of Court of Appeals Decisions

Under paragraphs "1", "19", "23", "25" and "29" of the subcontract between Wickham Contracting Co., Inc. and its subcontractors, the subcontractor agreed to the "flow-through" arrangement whereby the subcontractor must present its claims under the contract and its defenses to claims made against its work by the Government before the administrative forum in which the owner would be present (Board of Contract Appeals). The contract provisions were very specific in setting up this "flow-through" arrangement. However, both the District Court and Circuit Court refused to enforce these provisions.

In *McClary Enterprises, Inc.* v. *Maryland Casualty Company*, 530 F.2d 971 (4th Cir. 1975) the Circuit Court stayed the subcontractor's action pending the contractor's exhaustion of administrative remedies under the "disputes clause".

However, other Circuits including the Fourth Circuit in another case, have refused to do so on the ground that the contract provisions in those cases have been too vague. *Beacon Construction Co. of Massachusetts* v. *Prepakt Concrete Co.*, 375 F.2d 977, 982 (1st Cir. 1967); *B's Company* v. *Cleveland Electric Co. of South Carolina*, 373 F.2d 585, 588 (4th Cir. 1967); *Fanderlik-Locke Co.* v. *United States for Use of M.B. Morgan*, 285 F.2d 939, 942 (10th Cir. 1960).

There could be no possible claim herein that the subcontract provisions in which the subcontractor agreed to present his claims and defend claims against it by the Government in the administrative forum were vague. These provisions are very specific.

It is submitted that unless these contract provisions are enforceable, the general contractor will be unable to protect itself against inconsistent determinations of both forums and the District Courts will be unable to reduce the heavy volume of Miller Act litigation. This Court should fix the basis upon which the Government, general contractor and subcontractors may conduct their affairs without the confusion and chaos that presently exist under the present two forum system.

CONCLUSION

For the foregoing reasons, the writ of certiorari, should be granted.

Respectfully submitted,

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IRVING B. LAMPERT,
ARNOLD A. SECUNDA,
On the Petition and Brief

APPENDIX A

Opinion of Court of Appeals

(Filed—June 25, 1979)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of June, one thousand nine hundred and seventy-nine.

Present:

HONORABLE WILFRED FEINBERG
HONORABLE WILLAM H. TIMBERS
Circuit Judges

HONORABLE JACOB MISHLER
Chief District Judge

UNITED STATES OF AMERICA,
Plaintiff,

—against—

WICKHAM CONTRACTING CO., INC. and
THE INSURANCE COMPANY OF NORTH AMERICA,
Defendants-Appellants,

ROBERT J. HARDER, INC., *et al.*,
Defendants-Appellees.

79-7235
79-7304

Appendix A

UNITED STATES FOR THE USE AND BENEFIT OF CARDA WINDOW CORPORATION,

Plaintiff-Appellee,

—against—

WICKHAM CONTRACTING CO., INC. and INSURANCE COMPANY OF NORTH AMERICA,

Defendants-Appellants.

79-7236
79-7273

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

This is an appeal from a decision of the United States District Court for the Eastern District of New York, George C. Pratt, J., denying a motion by Wickham Contracting Co., Inc. to vacate previously granted summary judgment in favor of defendants H. Klein & Sons, Inc., Lejac Metal Specialties, Inc. and Robert J. Harder, Inc. in an interpleader action brought by the United States government, and in favor of use-plaintiff Carda Window Corporation in a separate Miller Act action. Wickham also appeals from the district court's denial of its motion for a declaratory judgment that Wickham is the owner of interpleaded funds deposited by the United States government into the court.

Appendix A

Wickham and its bonding company, appellant The Insurance Company of North America (INA), did not prosecute their appeals from Judge Pratt's grant of summary judgment to appellees, pursuant to a lengthy opinion dated October 10, 1978. Wickham failed to file the record and its brief on appeal as scheduled and this court entered an order dismissing Wickham's appeal on January 4, 1979. Wickham's motion to reinstate its appeal was denied on January 30, 1979. INA withdrew its appeal subject to reinstatement within 30 days, but it did not timely reinstate the appeal.

The district court treated Wickham's untimely motion to renew and rehear the motions for summary judgment and to vacate or modify the judgment as a motion for relief from the judgment under Fed.R.Civ.P. 60(b). Since appellees did not prosecute appeals from the grant of summary judgment, the narrow issue before us is whether Judge Pratt abused his discretion in refusing to reopen the judgment under Rule 60(b). We find that this was not an abuse of discretion for the reasons given in Judge Pratt's opinion dated March 16, 1979. We also affirm Judge Pratt's decision not to declare Wickham to be the owner of the interpleader fund at this time, since all the

claims to the fund have not yet been settled in the district court.

WILFRED FEINBERG
Wilfred Feinberg

William H. Timbers
WILLIAM H. TIMBERS
Circuit Judges

JACOB MISHLER
Jacob Mishler
Chief District Judge

APPENDIX B

Opinion of District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DOCKET No. 77 C 1012

UNITED STATES for the Use and Benefit of
CARDA WINDOW CORPORATION,

Plaintiff,

—against—

WICKHAM CONTRACTING CO., INC., *et al.*,

Defendants.

PRATT, J:

By order to show cause signed January 31, 1979 and made returnable February 9, 1979, defendant Wickham Contracting Co., Inc. moves for leave to (1) renew and rehear the motions for summary judgment made by defendants H. Klein & Sons, Inc., Lejac Metal Specialties, Inc., and Robert J. Harder, Inc. in the 77 C 1672 action, and by use-plaintiff Carda Window Corporation in the 77 C 1012 action, vacating the judgments entered against Wickham in favor of Klein, Lejac and Carda, and modifying the court's decision of October 10, 1978 as to Lejac; (2) serve an answer to the cross-claims of subcontractors

who are parties in the 77 C 1672 action, whose claims have not already been settled by Wickham, asserting as counterclaims to the cross-claims, the claims alleged by the government for incomplete and/or incorrectly performed work and delay damages attributable to those parties by the decision of the contracting officer dated January 11, 1979; (3) implead as third-party defendants the bonding companies of each subcontractor whose work or supplies are affected by the contracting officer's decision; and (4) granting judgment to Wickham, declaring it to be the owner of the interpleader fund deposited by the government with the Clerk of the Court in the 77 C 1672 action.

1. Wickham's motion for leave to renew and rehear the previous summary judgment motions and to vacate or modify the judgments entered therein, is not timely, treated as a motion for reconsideration under EDNY General Rule 9(h); the motion will, therefore, be considered as one for relief from a judgment or order under FRCP 60(b).

a. *H. Klein & Sons, Inc.*, 77 C 1672—As one basis for its motion with respect to Klein, Wickham argues that the decision of the contracting officer, dated January 11, 1979, attributes delays of one year to work which the subcontractor was to complete, specifically, the period from January 7, 1976 through January 1, 1977. Wickham did not previously raise this in opposition to Klein's motion for summary judgment, although the facts set forth by the contracting officer were either known to or could have easily been discovered by Wickham with due diligence at the time of the alleged delay. Wickham was responsible for supervising the work of its subcontractors, and should have been aware of any delay or incomplete work at the time. It cannot rely on the contracting officer's decision as newly discovered evidence under FRCP 60(b)(2).

Wickham also argues that the court's decision of October 10, 1978 considered an erroneous figure as Klein's subcontract price: that the actual contract price was $32,990 rather than $40,780. The documentation presented earlier in support of Klein's summary judgment motion indicates that the latter figure is the correct amount; Wickham has presented no new documents or facts, simply arguments, to change that finding. Accordingly, with respect to Klein, Wickham's motion is denied.

b. *Lejac Metal Specialties, Inc.*, 77 C 1672—In its October 10, 1978 decision, the court denied Lejac's motion for summary judgment, but determined, pursuant to FRCP 54(d), that (1) Lejac's work under the contract and claimed extras was satisfactory, and (2) that Lejac had been paid $4,220. The court held, however, that there were factual questions about an additional $9,000 in extra work claimed by Lejac, and whether such work had been authorized by Wickham and performed by Lejac. Wickham again relies on the contracting officer's decision to assert that incomplete work and delays are attributable to Lejac. Again, however, Wickham did not raise these facts in opposition to Lejac's earlier motion, and may not do so now. Accordingly, the court's determinations with respect to Lejac will not be disturbed, and Wickham's motion to modify the decision is denied.

c. *Robert J. Harder, Inc.*, 77 C 1672—Wickham first asserts that Harder unilaterally amended the copy of its subcontract submitted to the court in connection with the summary judgment motion, by crossing out major portions. The court finds no merit in this. Certain portions of the contract were apparently highlighted with a felt marker, specifically, ¶¶15, 18(a) & (c), but they were not deleted; furthermore, contrary to Wickham's assertion

that ¶21 requires a subcontractor's claims for payment for extra work to be presented within two days after it is directed to proceed with work and fails to do so, the Harder contract was amended to read ten days, and the amendment was initialled by both signatories.

Harder presented its claims to Wickham's surety, INA, in a letter dated October 21, 1977, approximately two months prior to serving its answer in the 77 C 1672 action; see Exhibit C to Harder's Motion for Summary Judgment. This included the claim for extra work in the amount of $4,037. This contradicts Wickham's assertion that the first notice it had of Harder's claims was when the latter's answer was filed.

Finally, Wickham argues that the contracting officer disallowed Harder's claim for extra work, in the amount of $4,037, which was part of the court's October 10, 1978 decision awarding judgment to Harder. The contracting officer noted that Wickham did not provide adequate documentation for the claim, but Harder should not be bound by that decision or by Wickham's failure to present the claim adequately.

Accordingly, Wickham's motion, with respect to Robert J. Harder, is denied.

d. *Carda Window Corporation,* 77 C 1012—Wickham again merely relies on the contracting officer's decision attributing certain delays in the work Carda performed. No new facts are revealed that could not have been disclosed at the time of Carda's initial motion for summary judgment. Accordingly, the court's decision shall stand, and Wickham's motion with respect to Carda is denied.

2. Wickham's motion for leave to serve answers to the cross-claims of subcontractors in the 77 C 1672 action,

whose claims have not already been settled by Wickham, is granted. Wickham shall serve and file its answers within ten days of this order.

3. Wickham's motion for leave to implead as third-party defendants the bonding companies of each subcontractor whose work or supplies is affected by the contracting officer's January 11, 1979 decision, is granted, but only with respect to those subcontractors who remain as parties in the various actions.

4. Wickham's motion for judgment declaring it to be the owner of the interpleader fund deposited in the court by the government, is denied. INA requests that the fund be placed in an interest bearing account. Unless any claimant to the interpleader fund files a written objection to such action within ten days, the Clerk of the Court is directed to deposit the interpleader fund into an interest-bearing account. See 28 USC §2041; *Prudential Insurance Company of America* v. *King,* 308 F Supp 1143 (WD Mo 1969).

Finally, INA's claims for attorneys fees and expenses in 77 C 1012 were to have been determined at a hearing scheduled for December 29, 1978; INA similarly seeks fees and expenses in connection with the actions of the subcontractors which have been settled. A single hearing on all such requests will be held after determination of all other issues in these proceedings.

All counsel are directed to appear before the undersigned for a status conference at the Long Island Courthouse on April 10, 1979 at 4:00 p.m.

So Ordered.

Dated: Westbury, New York
March 16, 1979.

George C. Pratt
U. S. District Judge

APPENDIX C

Respondents Who Still Have An Interest

Lejac Metal Specialties, Inc.

Gifford Construction Company

Piping Enterprises, Inc.

Young Contracting Corp.

Robertshaw Controls Company

H. Klein & Sons, Inc.

York Concrete Corp.

St. Charles Manufacturing Company

Black Iron Sheet Metal Works

Carda Window Corporation

Robert J. Harder, Inc.

United States of America

Marble Face Blocks, Inc.

APPENDIX D

Pertinent Subcontract Provisions

* * *

19. In the event the Owner makes any changes in the Drawings or Specifications or in any other portions of the Principal Contract, such changes insofar as they affect the work contracted hereunder shall be deemed incorporated as changes under the Subcontract. The Subcontractor shall within five (5) days after the Contractor's written request, supply to the Contractor a cost breakdown for its portion of the work affected by such changes. If the Subcontractor fails to so provide such cost breakdown, the Contractor may prepare and submit such cost breakdown as it determines and same shall be binding upon the Subcontractor as if made by the Subcontractor. If such changes cause an increase in the cost of doing work under the Subcontract or in the time required for its performance, then in lieu of all claims and demands which the Subcontractor might otherwise have or make, the Subcontractor shall accept in full satisfaction and discharge of all such claims and demands such amount, if any, as may be paid by the Owner to the Contractor on account of the Subcontractor's claims and demands (exclusive of the Contractor's percentage thereon), and the number of days to be added to the contract running time on account thereof. If such changes cause a decrease in the cost of doing the work under this Subcontract or in the time required for its performance, then, in lieu of all claims and demands which the Subcontractor might otherwise have or make, the Subcontractor shall accept in full satisfaction of all such claims and demands the Owner's determination as to the amount of money and/or the number of days to be deducted on account thereof and, the Subcontract price

herein shall be reduced accordingly whether or not same has been reflected in payments made by the Owner to the Contractor. The Subcontractor hereby agrees subject to the prosecution of its claim against the Owner as hereinafter provided to accept the Owner's determination as aforesaid in full and complete discharge and release of the Contractor's liability to the Subcontractor by reason of any such change or changes and agrees to be bound and concluded thereby and agrees never to look to the Contractor on account thereof, except for such moneys, if any, as the Owner may have paid the Contractor in satisfaction of the Subcontractor's claims and demands, as aforesaid. In the event that Subcontractor disputes the Owner's determination and providing that Subcontractor gives timely notice of such dispute to Contractor so as to permit Contractor to give notice to the Owner as required by the Principal Contract, Contractor will, at the written request of and at the sole cost and expense of Subcontractor, permit Subcontractor as provided in paragraph 23 hereof, to prosecute in the name of Contractor all rights and remedies available to Contractor under the terms of the Principal Contract or otherwise with respect to Subcontractor's claim or dispute arising out of the Owner's determination.

* * *

23. As to so much of any claim of Subcontractor (1) for additional or extra work (where Subcontractor disputes the Owner's determination under Paragraph 19), or (2) for damages for delay or interference or for any other cause that may be, or which Contractor asserts is, attributable to or arises out of the actions, complaints, neglects, defaults or orders of the Owner, Subcontractor hereby agrees that its rights with respect to any such claim shall be subject to determination in the same forum

(whether administrative proceedings, arbitration or action at law or otherwise) and Subcontractor shall be bound by the same remedy or remedies as are available to Contractor as against the Owner under the terms of the Principal Contract or otherwise and Subcontractor hereby agrees that it shall be conclusively bound by any such determination of its rights with respect to any such claim. With respect to any such claim, Subcontractor may, after written request to Contractor, at Subcontractor's sole cost and expense, timely present and prosecute through and in the name of Contractor such claim against the Owner. In the event of an adverse decision with respect to Subcontractor's claim at any interim stage of the prosecution thereof, Subcontractor shall within thirty (30) days after such interim adverse decision, notify Contractor in writing as to whether it intends to appeal and/or further prosecute its claim. In the event of Subcontractor's failure to do so within said thirty (30) days period, Subcontractor shall be deemed to have elected to waive the further prosecution of its claim and Contractor shall have no liability whatsoever to Subcontractor on account thereof. In the event that Subcontractor elects to present and prosecute its claim, as provided for above, through and in the name of Contractor and Contractor or any of its other subcontractors or suppliers shall have a claim or claims of their own related in whole or part to Subcontractor's claim, the selection of the forum, if a selection is available, and the election of the remedy or remedies, if an election is available, for the prosecution of said related claims and Subcontractor's claim shall be made solely by Contractor and the presentment and prosecution of the related claims and Subcontractor's claim shall be by counsel selected by Contractor and the cost and expense of such counsel shall be pro-rated amongst the parties in direct proportion to the amount of their respec-

tive claims. No action or proceeding may be commenced by Subcontractor against Contractor and/or its surety with respect to any such claim of Subcontractor until there has been a final adjudication of such claim in the forum in which said claim is being prosecuted, excepting only in the event that commencement of such action is required in order to prevent the lapsing of the applicable Statute of Limitations in which event said action or proceeding as so commenced shall be subject to a stay thereof (to which Subcontractor hereby agrees) until such time as the final adjudication of Subcontractor's claim is had as herein provided. The cost and damages incurred by Subcontractor on account of any such claim shall not in any event be chargeable to Contractor but shall only be payable by Contractor to Subcontractor and Subcontractor shall receive in full satisfaction and liquidation of any such claim such amount, if any (less Contractor's percentage thereon together with the cost and expense incurred by Contractor in presentment and prosecution of Subcontractor's claim) that Contractor shall receive from the owner, it being expressly understood and agreed that the liability if any, of Contractor to Subcontractor for such claim shall be payable only out of the funds, if any, received by Contractor from the Owner on account of any such Subcontractor claim.

* * *

25. The Subcontractor agrees to immediately comply with any and all written orders and directions given by the Contractor, irrespective of whether or not the Subcontractor shall dispute the same in any particular, without waiting for the determination of the Owner, where applicable, with respect to any such dispute, or in cases where the Owner shall not be involved, then without waiting for the judgment of a court of competent jurisdiction.

In the event of a dispute, question or claim arising out of an order, direction, act, determination, omission, neglect, written or oral complaint, or default of the Owner, the Subcontractor's right in respect thereto is to have submitted to the Owner by the Contractor for the Owner's determination, any such dispute, question or claim pursuant to the procedures, administrative, judicial or otherwise, outlined in the Principal Contract and in this Subcontract. Such submission, if made by the Contractor, shall be at the Subcontractor's sole cost and expense. The fact that the Contractor makes such claim against the Owner shall not be deemed an admission by the Contractor of the validity of the Subcontractor's claim nor shall such request by the Contractor against the Owner be used at any time by the Subcontractor against the Contractor in any proceeding whatsoever.

* * *

29. If at any time any claim shall be made against the Contractor or against the moneys due or to grow due to it, or against the land upon which the Project shall be located, against which the Subcontractor has indemnified or agreed to indemnify the Contractor hereunder, or if the Contractor has any claim against the Subcontractor as a result of the Subcontractor's default, act, omission or neglect hereunder, then the Contractor shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to indemnify the Contractor against any such claim and the expenses of defending or discharging the same or to completely satisfy any such claim the Contractor may have against the Subcontractor. If any such claim shall be made or established after all payments have been made to the Subcontractor, the Subcontractor shall refund or pay over to the Con-

tractor all moneys that the Contractor may be compelled to pay in discharging or disposing thereof and of any other claims made or expenses incurred by the Contractor in consequence of the Subcontractor's default, act, omission or neglect, and this agreement on the part of the Subcontractor shall not be affected by the fact that final payment was theretofore made. The Contractor may withhold all or any part of any payment to the Subcontractor on account of the failure of the Subcontractor to fully comply with the requirements of this Subcontract and said payments withheld will not be due and owing until the cause or causes for withholding them has or have been removed by the Subcontractor and evidence to that effect, satisfactory to the Contractor, is furnished to the Contractor by the Subcontractor.

79-840

SUPREME COURT, U.S.
FILED
DEC 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979
NO.

WICKHAM CONTRACTING CO., INC. and INSURANCE COMPANY OF NORTH AMERICA,

Petitioners,

-against-

ROBERT J. HARDER, INC., LEJAC METAL SPECIALTIES, INC., H. KLEIN & SONS, INC., CARDA WINDOW CORPORATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Carda Window Corporation (hereinafter "Carda") submits this brief in opposition to the petition of Wickham Contracting Co., Inc. (here-

inafter "Wickham") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The petition for certiorari filed by Wickham seeks review of the order of the United States Court of Appeals for the Second Circuit filed on June 25, 1979 in two separate cases -- an interpleader action (Appeal No. 79-7235), and a Miller Act action (Appeal No. 79-7236). The petition, however, bears only the caption of the interpleader action and fails to distinguish the Miller Act action, in which Carda is named as use-plaintiff.

This distinction is important, for the Miller Act action involves only a dispute between Wickham, as general contractor, and Carda, as subcontractor. The government is not a party and no federal questions warranting review by this Court are involved.*

* In making this distinction we do not wish to imply that certiorari is warranted in the interpleader action. Indeed, the reasons advanced by us for denying the petition (infra at 11) may very well apply to the interpleader action.

Opinions Below

The decision of the Court of Appeals (Wickham's petition, App. A) is not yet reported. The decision of the District Court on the Miller Act action (Petition, App. B) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 25, 1979, and a petition for rehearing en banc was denied on August 10, 1979. On November 14, 1979 Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including November 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

With regard to the Miller Act action, the questions presented to this Court are not those as posed by Wickham at page 2 of its petition. Rather, we submit that the only question before this Court, and the only question which was before the Court of Appeals, is whether the District Court abused its

discretion in denying petitioner's motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure (Sampson v. Radio Corporation of America, 434 F.2d 315, 317 (2d Cir. 1970)).

The question asserted by Wickham, relating to a stay of Carda's Miller Act suit, was neither before the Court of Appeals nor the District Court. The sole request made by Wickham for a stay in the District Court was limited to claims for additional or extra work and for damages for delay or interference by subcontractors (other than Carda) named as party defendants in the interpleader action. Carda, in its Miller Act action, sought only its contract balance -- which had been paid to Wickham. And, it was only upon this claim that Carda moved for summary judgment before the District Court.

The "important question of federal law" (Petition at 9) and the "conflict of Court of Appeals decisions" (Petition at 12) simply do not exist in either the interpleader or Miller Act action. The Court of

Appeals ruled solely on the narrow ground that the District Court did not abuse its discretion in refusing to disturb judgments granted to Carda and certain other of Wickham's subcontractors.

Statute Involved

The Miller Act, 40 U.S.C. 270a-270b, is produced by Wickham at pages 2-3 of its petition.

Statement of the Case

Carda's action under the Miller Act was instituted in May 1977 to recover the contract balance due under its subcontract with Wickham for the installation of aluminum windows in Samuels Hall, a facility at the United States Merchant Marine Academy. Wickham was the general contractor for the alterations and rehabilitation of the facility.

Several months earlier, in September 1976, Wickham had received a progress payment representing the balance due for 95% of Carda's work. This payment was illegally diverted by Wickham for use in connection with another of its projects.

In March 1978, Carda moved for summary judgment relying upon the undisputed facts that, as of August 1976, Carda had substantially completed its contract; that Wickham had received payment for the work completed by Carda; and that Wickham had breached its contract with Carda by failing to make the progress payment then due.

In opposition to Carda's motion, Wickham asserted that Carda's work was incomplete and that Carda had delayed Wickham's overall performance by failing to make timely window sample submissions. (Shortly before Carda moved for summary judgment, the Department of Commerce, with whom Wickham had contracted for the alterations to Samuels Hall, terminated Wickham's contract and issued a reprocurement contract to another contractor to complete the work remaining open under Wickham's contract. In further opposition to Carda's motion, Wickham asserted that numerous items on the reprocurement contract were attributable to Carda's work. However,

from an examination of the "punch list," which formed the basis of the reprocurement contract, it became apparent that the work attributable to the installation of windows was of a minor nature and involved only patching and painting.)

In granting the motion, the District Court found that Carda had completed its work and that Wickham failed to support its claims that Carda was responsible for significant portions of the reprocurement contract or for the liquidated damages which the government asserted against Wickham, stating:

> "[I]n December 1976, Wickham certified to the United States that the aluminum window work even then was 95% complete. At a status conference in open court, the representative of the Department of Commerce stated that Carda's work had been fully accepted by the government. No facts have been presented to suggest that Carda's work was not completed. Slip op. at 14-15."

Accordingly, the District Court granted Carda's motion for summary judgment against both Wickham,

and its surety, INA, but without prejudice to the issues asserted by Wickham in its counterclaims. The Court made provision to secure those counterclaims by requiring Carda to file a bond or a cash deposit in the amount of $8,000 as a condition precedent to the entry of judgment. This deposit was made and judgment was entered on November 21, 1978 in the sum of $50,326.45.

Both Wickham and INA filed notices of appeal; Wickham, however, failed to docket its appeal and the Court of Appeals dismissed same. While INA did docket its appeal, the appeal was withdrawn, subject to reinstatement within thirty days. Subsequent to the dismissal of its appeal, Wickham applied for reinstatement; the application was denied. INA failed timely to reinstate its appeal.

By order to show cause dated January 31, 1979, Wickham moved for various forms of relief in the Carda action, the interpleader action, and other related Miller Act actions. With respect to the Carda

action, Wickham sought renewal and rehearing of the motion for summary judgment on the grounds that, inter alia, the contracting officer of the Department of Commerce issued a decision "containing facts which, if known to deponent [Wickham's project manager] prior to this, would have substantially changed the pleadings in this action submitted by defendant Wickham Contracting Co., Inc. and would have changed the facts presented by the defendant Wickham Contracting Co., Inc. in its affidavits in opposition to the motions for summary judgment made by ... Use-Plaintiff Carda Window Corporation."

However, further examination of Wickham's moving affidavit and the decision of the contracting officer relied upon by Wickham (with respect to Carda), revealed that no new facts were presented in support of the relief sought. Wickham's counterclaim (first asserted in its answer in July 1977) sought damages from Carda for "Punch list work" (see ¶11, answer of Wickham, 77 Civ. 1012). This contention

was repeated in opposition to Carda's motion for summary judgment, and was allegedly supported by an "architectural list" used by the government in reletting the work for Samuels Hall -- the same list referred to on Wickham's motion for rehearing.

Additionally, Wickham, in opposition to Carda's motion for summary judgment, claimed that Carda was responsible for delays in performance. Anthony J. Biele, Wickham's president, stated that a portion of the liquidated damages then being asserted against Wickham by the government "may be attributable to Carda's work" and that "the government is contending that Carda delayed the project by failing to timely make its window submittals. (See Biele affid., July 29, 1978 at p. 3)." Again, this was the same claim raised in support of its motion to rehear.

Thus, nothing new was offered to the District Court to support Wickham's request for Rule 60(b) relief. As held by that Court:

> "Wickham again merely relies on the contracting officer's decision

> attributing certain delays in the work Carda performed. No new facts are revealed that could not have been disclosed at the time of Carda's initial motion for summary judgment. Accordingly, the Court's decision shall stand, and Wickham's motion with respect to Carda is denied." (Petition at 8a)

The Court of Appeals affirmed, holding that

> "[T]he narrow issue before us is whether Judge Pratt abused his discretion in refusing to reopen the judgment under Rule 60b. We find that this was not an abuse of discretion for the reasons given in Judge Pratt's opinion dated March 16, 1979." (Petition at 3a)

We submit that, despite Wickham's effort to enlarge the issue before this Court, the issue remains a narrow one as defined by the Court of Appeals. Thus, no basis exists for the issuance of a writ of certiorari as requested by Wickham.

Reasons for Denying the Petition

Contrary to Wickham's assertion, there are no important questions of federal law involved in either

the interpleader or Miller Act action. No stay was sought in the Miller Act action and there is no issue involving the determination of disputes in "two possible forums" (Petition at 9). Indeed, had a stay been sought, it would have been denied.

It is well settled that a subcontractor's exclusive remedy to recover its contract balance is a suit under the Miller Act. H.W. Caldwell & Son, Inc. v. United States for Use and Benefit of John H. Moon & Sons, Inc., 407 F.2d 21 (5th Cir. 1969); Beacon Construction Co. of Massachusetts v. Prepakt Concrete Co., 375 F.2d 977 (1st Cir. 1967); United States for Use and Benefit of B's Co. v. Cleveland Electric Co. of South Carolina, 373 F.2d 585 (4th Cir. 1967). See also, United States for Use and Benefit of T/N Plumbing & Heating Co. v. Fryd Construction Corp., 423 F.2d 980 (5th Cir. 1970); Warrior Constructors, Inc. v. Harders, Inc., 387 F.2d 727 (5th Cir. 1967); Fanderlik-Locke Co. v. United States for Use of M.B.

Morgan, 285 F.2d 939 (10th Cir. 1960), cert. denied, 365 U.S. 860 (1961); Fett Roofing & Sheet Metal Co., Inc. v. Seaboard Surety Co., 294 F.Supp. 112 (E.D. Va. 1968). In Warrior Constructors, Inc. v. Harders, Inc., supra, 387 F.2d at 729, the court stated:

> "The remedy for a subcontractor seeking to recover for labor and materials furnished on a government contract is under the Miller Act, and it has been held that when a prime contractor has a claim for the same amounts pending under the 'disputes clause' of the prime contract, a subcontractor's claim under the Miller Act is not affected."

Nevertheless, Wickham offers a transparent argument that the present dispute is one between the government and Carda (Petition at 10). Such is not the case -- the dispute is one in which Carda only sought to recover the balance of its contract. As stated supra, Wickham inspected and subsequently certified that Carda's work was 95% completed, for which Wickham received payment from the government. Instead of paying Carda, and in contravention

of its contract with Carda, Wickham illegally diverted the government monies to another project on which it was working.

Had the government failed to pay Wickham for Carda's work, then the appropriate remedy may have been an administrative one. However, the dispute that arose between Wickham and Carda is one in which the government is not involved and the so-called "disputes clause" relied upon by Wickham has no application. See Fanderlik-Locke Co. v. United States for Use of M.B. Morgan, supra, 285 F.2d at 941; Beacon Construction Co. of Massachusetts v. Prepakt Concrete Co., supra, 375 F.2d at 979; H.W. Caldwell & Son, Inc. v. United States for Use and Benefit of John H. Moon & Sons, Inc., supra, 407 F.2d at 23-24.

The only possible limitation upon Carda's right to sue under the Miller Act is contained in Articles 23 and 25 of the subcontract, and these articles do not relate to Carda's right to recover its contract balance. The plain reading of Article 23 (Petition, Appendix D

at 12a) compels the conclusion that only where the subcontractor makes a claim for (1) additional or extra work, or (2) damages for delay or interference due to actions of the government, must it refrain from instituting legal action until there has been a final adjudication in administrative proceedings. Article 23 does not relate to a subcontractor's claim for its contract balance.

Similarly, Article 25 relates only to "a dispute, question or claim arising out of an order, or acts of the government" -- not a claim for monies due and owing the subcontractor (and which have been paid to and were illegally diverted by the contractor).

Nor does either Article 23 or 25 relate to the prosecution and defense of claims against the subcontractor, as contended by Wickham (Petition at 12). These articles provide no basis for a stay of a Miller Act suit instituted by the subcontractor to recover contract balances.

* * *

Likewise, there are no conflicting Courts of Appeals decisions in this regard, as contended by Wickham (Petition at 12-13).

The only case offered by Wickham in support of its contention is not applicable to the instant action and does not conflict with other authorities. In United States of America and/or Metropolitan Area Transit Authority v. Maryland Casualty Co., Civ. Action 75-1676 (4th Cir. 1975), aff'd, 530 F.2d 971 (4th Cir. 1975), the parties had agreed that the Miller Act was not applicable and that the disputes clause did, in fact, govern the issues being litigated. The Fourth Circuit noted that the conclusion of the administrative proceedings "may eventually moot the entire Civil action."

Such a result is not possible at bar; Carda's claim is not before the Department of Commerce, and even Wickham does not contend that the administrative proceedings will in any manner affect the determination by the District Court that Carda is entitled

to judgment for its contract balance. Further, the District Court in Maryland Casualty was asked to stay the entire proceedings, whereas, in the instant case, Wickham requested a stay of proceedings only,

> "with respect to the claims asserted by [the subcontractor] for additional and extra work and/or for damages for delay and interferences or for any cause that may be or which defendant Wickham Contracting Co., Inc. asserts is attributable to or arises out of the action, complaints, neglects, default or orders of the Government pursuant to Articles 23 and 25 of the subcontract between Wickham Contracting Co., Inc. and its subcontractors."

Maryland Casualty is thus not in conflict with either the decision herein or the decisions cited at page 13 of Wickham's petition. No basis exists for the issuance of a writ of certiorari.

Conclusion

For all the foregoing reasons, Wickham's petition for a writ of certiorari should be denied.

Dated: New York, New York
December 27, 1979

Respectfully submitted,

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